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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1136

DEBORAH A. NORTHCROSS, *et al.*,
Petitioners,

vs.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND TO APPLICATION FOR INJUNCTION

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Preface

(We respectfully ask that this Brief be considered as our response to Petitioners' Motion For Injunction as well as their Petition For Certiorari.)

STATEMENT OF THE CASE

I. The Decision of the Court of Appeals

Petitioners filed in the Court of Appeals a Motion For Summary Reversal, a Motion To Require Adoption Of A Unitary System Now, and a Motion To Convene An Emergency Panel Of The Sixth Circuit. This last motion was filed on November 13, 1969, and as promptly as possible thereafter and immediately following the filing of a portion of the transcript, the Court of Appeals set the cause for argument.

Argument was presented on December 17, 1969, and both parties were given unlimited time to present their oral argument. Promptly following this argument, the Court entered the order remanding the case to the District Court. This order noted the Court's familiarity with the desegregation process in the schools of the City of Memphis since the case had been before the Court in 1962 and 1964 (1a).

Thereafter, petitioners filed a Motion For Injunction Pending Certiorari and, in acting on that motion, the Court of Appeals rendered an Opinion which stated, in part:

> "To the extent that the relevant factual context of the above cases is disclosed by the opinions available to us, we conclude that they are not analogous to the case before us. *We are satisfied that the respondent Board of Education of Memphis is not now operating a 'dual school system' and has, subject to complying with the present commands of the District Judge, converted its pre-Brown dual system into a unitary system 'within which no person is to be effectively excluded because of race or color.'* In *Alexander v. Holmes Board of Education, supra*, the Supreme Court exposed the question then before it as involving:

'the denial of fundamental rights to many thousands of school children who are presently attending Mississippi schools under segregated conditions contrary to the applicable decisions of this Court.'

"This quotation is not descriptive of the present situation of Memphis. For the school year 1969-70, there are approximately 134,000 children enrolled in the schools of Memphis, of which approximately 60,000 are white and 74,000 are Negroes. Upon the oral argument of this appeal, we asked counsel for plaintiffs to advise what he considered would be the 'unitary system' that should be forthwith accomplished in Memphis. *He replied that such a system would require that in every public school in Memphis there would have to be 55% Negroes and 45% whites.* Departures of 5% to 10% from such rule would be tolerated. The United States Supreme Court has not announced that such a formula is the only way to accomplish a 'unitary system'. We have expressed our own view that such a formula for racial composition of all of today's public schools is not required to meet the requirement of a unitary system. *Deal* v. *Cincinnati Board of Education*, (Ohio schools) 369 F. 2d 55 (6th Cir. 1966), Cert. Denied, 389 U. S. 847 (1967); *Mapp* v. *Board of Education*, (Tenn. schools) 406 F. 2d 1183 (6th Cir. 1969); *Deal* v. *Cincinnati Board of Education*, (Ohio schools) ..... F. 2d ..... (6th Cir. 1969).

"The District Judge's opinion in this case evidences his awareness of today's requirements for school desegregation and his purpose to require strict obedience by the Memphis Board of Education to all of such requirements. We are advised that the plan which he required to be filed by January 1, 1970, is now before him. We are satisfied that he will consider it with appropriate dispatch, to the end that any deficiencies in the plan now in operation in Memphis will be corrected.

"Our own familiarity with the progress of desegregation in the Memphis schools and our confidence in the

> District Judge to whom we have remanded this litigation suggests that it is not now needed that we issue the injunction asked." (App. 7a-8a).

As will be seen from the above quotation, it was petitioners' position in the Court of Appeals that the "unitary system" required by *Alexander* v. *Holmes County Board of Education*, 398 U. S. 19, contemplates that the Memphis school system must have a racial ratio of 54.3 per cent Negro and 45.7 per cent white pupils in each of the approximately 170 schools in the City of Memphis. As a corollary to this requirement and because of neighborhood housing patterns, substantial bussing of pupils will be required to reach this result. The issue in this Court, stated simply, is whether a school system must reflect the approximate racial enrollment of the system in each of the schools in that system in order to meet the requirements of the Federal Constitution or to become a unitary system as this Court has required in *Holmes County*.

Respondents respectfully urge that the Court of Appeals' decision that Memphis has converted to a unitary system is eminently correct.

II. The Memphis School System

The Board of Education of the Memphis City Schools is a corporation chartered by the General Assembly of Tennessee in 1868. It is separate from the City of Memphis and exclusive management of the Memphis school system is vested in five elected school commissioners (Private Acts, 1868-69, Ch. 30, Sec. 1).

This Board manages the twelfth largest school system in the United States. In the school year 1968 the total enrollment was 128,280 pupils, of whom 65,170 were Negro and 58,110 were white. In the present school year, total

enrollment has increased to 134,274, of whom 72,890 are Negro and 61,384 are white. The system has shown the normal growth of other large urban centers except that growth of the Memphis system has been sharply accelerated by a five-year annexation program in which substantial areas of Shelby County have been incorporated into the City of Memphis. In the present school year, enrollment increased by almost 6,000 students with predominant growth being in the number of Negro students (Ex. 1, 12a, 24a).

In 1968 more than 5,000 teachers were employed by the Memphis City Schools. Approximately 45 per cent of the faculty were Negroes. Approximately one-half of the 135 school principals are black. Black principals serve at schools with predominantly white enrollment and white principals are assigned to schools with predominantly black enrollment.

The population of Memphis is slightly more than 600,000 with substantial increases expected in the next three years as a result of the annexation program. This population is distributed racially in much the same way as the population of cities in other areas of the country. The black population tends to cluster in two or three substantial areas in the North Central and South Central portions of the City. The Central portion of the City is substantially integrated, but predominantly white (11a). The entire Eastern, Northern and Southernmost sections of the City are inhabited almost entirely by whites. The Mississippi River forms the Western boundary of the City.[1]

1. As petitioners' Brief so frequently notes, Memphis is also contiguous to Marshall County, Mississippi (Br. Pg. 4, F.N. 2). Petitioners' first reference to Marshall County makes a *false* comparison of the two school systems. If the same statistical standard applied by the Court in *Marshall County*, 409 F. 2d at 1288, 1289, is applied to Memphis, then almost 30% of the Negro students (18,625) attended desegregated schools in Memphis in

III. Desegration of the Memphis Schools

Before discussing the achievements of this school system, it is important to ascertain what goals this Honorable Court expects of a public school system. As we read the decisions of this Court in this very important field, we believe that two basic tests have been established. The first test examines results which have been obtained and, secondly, the Court examines whether the Board's conduct has been such as to evidence its good faith in removing "root and branch" every vestige of racial discrimination and indicates a continuing commitment to see that this condition remains. See *Green* v. *County School Board of New Kent County*, 391 U. S. 430; *Raney* v. *Board of Education of Gould*, 391 U. S. 443; *Monroe* v. *Board of Commissioners of Jackson*, 391 U. S. 450; and *Alexander* v. *Holmes County*, 398 U. S. 19.

A third criterion, which has not been stated by this Court but may be inferred from its decisions, might be added. We refer to establishing an attitude on the part of a school board, school administrators and faculty that makes them dedicated to the principle that discrimination in public education is morally wrong. We respectfully submit that the Memphis School System meets these tests.

We support our position, in part, with a very broad statement—*The Memphis School System has achieved as much, if not more, school desegregation than any other*

1968. In 1969 while there was a small reduction in this percentage, the number of Negro students attending desegregated schools increased to 21,746 (24a).

Incidents of statistical falsity such as this lend strong support to respondents' suggestion, reflected more fully in its Supplemental Plan, that Courts would better serve constitutional principles and education if less emphasis were placed on statistics and more emphasis placed on productive programs such as those detailed in our Supplemental Plan.

major system in the United States.[2] This is true not only with respect to the number of pupils who enjoy a desegregated education but is also true with respect to faculties, athletics, extra-curricular activities, professional associations, and every area of school activities. Evidence to support this assertion appears in the Record. For example, Dr. Gordon Foster, petitioners' desegregation expert, could not cite a system with respect to pupils or faculty that had a greater amount of desegregation than Memphis (R. 136-146). Specifically with respect to faculty, in 1969, the City of Houston received much notoriety in educational circles for the amount of faculty desegregation in that system. Houston is twice the size of Memphis and it was lauded for having 400 teachers in a desegregated situation. With only half as many teachers, thus only half the opportunity to desegregate faculties as did the much larger Houston system, Memphis has 441 teachers on desegregated faculties at the comparable time[3] (R. 287-288).

A. School Desegregation

In 1961 schools were first desegregated in Memphis when thirteen Negro children were assigned to four schools. Each year since that date has seen a substantial increase in the amount of pupil desegregation, so that by September, 1968, 18,625 Negro students were attending desegregated schools and 28,961 white students were enrolled in such desegregated schools.

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2. While petitioners' reply brief in the Court of Appeals categorically denied this statement, that brief did concede that there was ". . . some support for the Board's position . . ." if the statistical game is not played under the rules which petitioners have established.

3. The amount of faculty desegregation in the Memphis schools increased substantially in the 1969 school year.

The pace at which the invidividual schools have been desegregated is as follows:

7 schools in 1962-63
14 schools in 1963-64
17 schools in 1964-65
33 schools in 1965-66
49 schools in 1966-67
60 schools in 1967-68
64 schools in 1968-69
93 schools in 1969-70

The constant progress which has been made by the Memphis system is all the more impressive in light of the problems which tend to defeat the increase of bi-racial enrollments. The most significant of these problems is the housing pattern of the Memphis area which placed many schools and many children a distance far removed from schools and neighborhoods where members of another race reside. This housing pattern tends inevitably to create a number of schools attended solely by members of one race, particularly in the areas which are the farthest removed from the residences of any members of the opposite race. Where geography presented an opportunity for additional desegregation, this housing pattern was overcome. For example, the Board, at its own instance, phased out the former Patterson School, an all-Negro school in East Memphis, and absorbed the Patterson School population into the formerly all-white schools in the area (21a). At the beginning of this year, Getwell and Keel schools were closed and the Negro students attending those schools were assigned to the closest white schools (R. 272, 390). The distance involved, however, would make this solution inapplicable to schools located far within an area housing a single race.

A second problem diminishing bi-racial enrollments has been the tendency toward "resegregation" experienced by schools in areas of changing housing patterns. A striking example of this tendency is Hollywood School which was ideally desegregated in 1965 and 1966 (Ex. 1) but by 1968 has completely resegregated. This problem has been aggravated by the tendency of white parents to leave the neighborhood in which what might be termed a "tipping point" has been reached in the composition of the school population. This "tipping point" phenomenon is acknowledged by petitioners' desegregation expert (R. 178-183). However, steady progress in the system's overall desegregation has been made in spite of losses in such individual instances.

Trial Exhibit 2 shows the rapid pace at which school desegregation has been achieved in the City of Memphis. In 1968, of the 123,280 pupils in the system, 47,586 of these pupils attended school with a mixed racial enrollment. Of course, petitioners are quick to insist that some of these schools have a small minority of the opposite race; hence, they should not be counted as desegregated schools. In all candor, respondents, in their statistics, count each school regardless of the racial ratio as a desegregated school so long as the school has bi-racial enrollment. Certainly to the pupils attending that school, it is desegregated whether or not petitioners choose to describe it as such since black students and white students are studying and working together and otherwise in association in a single school.[4]

4 We note that petitioners' statistics are based upon a rule that one does not count a pupil as attending a desegregated school unless at least 10 per cent of the enrollment of that school is of the opposite race. We are not advised as to the source of or the authority for petitioners' rule or why they have fixed that percentage rather than some lesser or greater amount. It is worth noting that this rule tends to detract from a careful study of actual conditions in the schools and lends unwarranted support to a charge of discrimination.

Suffice it to say, so far as students attending that school are concerned, you would have some difficulty convincing them that they were not attending a desegregated school.

While a school may have only one or two students of the opposite race in a given year, history of this school system shows that the process of desegregation develops rapidly and this single student is joined by others in a short time. Central High School and Messick, so much criticized in petitioners' Brief, page 7, are typical examples of the point we make. Central has a normal enrollment of approximately 1,200 students. In 1966, 33 Negro students attended Central. In 1967, 66 Negro students were enrolled. In 1968, this enrollment had increased to 115, and in the current school year, 219 Negro students attend Central. With respect to Messick, the elementary school enrollment in 1968 was 414, of whom 27 were black but by 1969, Messick Elementary had an enrollment of 103 Negro students and 342 white students.[5] Other examples of this process of desegregation appear in Exhibit A which is appended to this Brief.

The case was tried in the District Court on the basis of the 1968 enrollment. The 1969 school year shows continued improvement. Almost 70,000 (52.1%) students, compared with 47,536 in 1968, out of the 134,274 enrolled in the Memphis system attend school with members of the opposite race. Of the 61,334 white pupils enrolled in the system, 48,241, *more than 78%*, attend school with a bi-racial enrollment. With respect to black students, 21,746 (exactly 30%) attend bi-racial schools (24a).

5. It might be noted that petitioners' "glaring island" argument in support of its gerrymandering charge, which is based in large part upon the zone lines for Central and Messick, would seem to be totally refuted by the racial balance at those two schools. The third predominantly white school referred to in the "glaring island" argument is Vollentine Elementary. The current enrollment at Vollentine is 441, of whom 285 are Negro students.

It is interesting to observe, too, that out of the approximately 170 schools serving the City of Memphis, only 11 schools have total white enrollment (29a). This does not mean, however, that these students are educated in a white isolated world. In addition to Negro faculty members, the Board sponsors and directs inter-racial exchanges through its Supplemental Plan and all of their inter-scholastic athletic programs are totally integrated.

B. Other Areas of Desegregation

Memphis is different from many other school systems in the United States in that Memphis has taken affirmative steps beyond the letter and the spirit of court orders to bring about a desegregated and non-discriminatory school system. As early as 1964, the Court of Appeals took note of the Board's voluntary commitment to accelerate the so-called "grade-a-year" Plan of Desegregation (See *Northcross* v. *Board of Education*, 333 F. 2d 661). The Inter-Scholastic Athletic Program and Summer Schools were desegregated several years ago without court order. Patterson School, a school with Negro enrollment, was closed without the command of a Court order so that those students could be assigned to a school theretofore attended only by white students. Again without Court order, plans were made to close Getwell and Keel Schools for the same purpose. Faculty desegregation began without court order and, most important, the Board of Education has formulated what it describes as a "Supplemental Plan" which it hopes and expects will go far toward achieving good race relations. This Supplemental Plan is in the Appendix and will be more fully discussed in a subsequent portion of this brief (b).

To state the matter quite simply, the Board of Education has exerted its best efforts to remove every conceivable

vestige of discrimination in this school system. More important, however, and long prior to *Green*, *Monroe*, *Raney* and *Holmes County*, school officials in Memphis had an affirmative attitude toward desegregation and took positive steps to make this meaningful. We have stated some of the voluntary, affirmative acts that the Board had taken in recognition of its duty to eliminate "root and branch" discrimination, but we believe that one particular event merits special comment.

It has often been said that the attitude of one's employees reflects the attitude of the employer. If this statement has merit, then we feel that the action of the Memphis Education Association (M.E.A.) speaks well of this Board. The M.E.A. is the professional teachers association serving this system and in 1968 ninety (90%) per cent of the more than 5,200 teachers employed by the Board were members of the M.E.A.

First, we note that this Association has been desegregated for many years and long prior to the desegregation of the corresponding state association. This desegregation occurred without a suggestion from the Court.

Second, even though the association has a majority of white teachers, the membership, in 1968, elected an outstanding Negro classroom teacher, Mr. James Catchings, as Vice President and in 1969, Mr. Catchings was elected to the office of President Elect. It is respectfully suggested that had this school system, through its elected Board and Administrative staff, been operated and managed by white racists, as petitioners imply, such an election would not have occurred.

In 1967, the Board, by nomination of the M.E.A., received the National Education Association—Thom McAn "Award of Excellence", the highest honor that can be paid a school system in the United States. The award was

given because of the excellent relation between the School Board, its staff and other professional personnel. This award would hardly have been given to a school system dominated by racists. . . .

Evidence also of the Board's affirmative attitude appears in the pamphlet "Dialogue of Dignity". This pamphlet was prepared by a bi-racial committee of school teachers and is distributed throughout the school system and the community. It was based, in part, on a number of speeches given to service clubs and other organizations in the community by Mr. E. C. Stimbert, Superintendent of the Memphis Schools. Mr. Stimbert, a native of Nebraska where he served as a public school teacher, principal and superintendent, was appointed superintendent of schools the year prior to the first desegregation in Memphis. We make this point to show that as promptly as he could do so after assuming his office, he and the Board began this process.

Evidence of the Board's positive attitude of encouraging desegregation appears with respect to Northside High School in the North Central section of the City. At the time Northside was planned, this was a racially-balanced neighborhood and the school was to be a showcase so as to maintain the mixed racial characteristics of the neighborhood (R. 376-377). The school was unique in that it offered a full academic as well as a full vocational program. The school was staffed with outstanding educators. In the interim between planning and opening the school, the neighborhood tended to resegregate so that by the opening of school in 1967, the enrollment was 932 Negro students and 234 white. In 1968, out of a total enrollment of 1,313 pupils, only 73 of them were white. The Board constructed this very expensive building and assigned some of the best faculty members that were available with the

view of encouraging desegregation and, while its efforts did not meet with the hoped-for result, Northside still remains a desegregated school and an example of the Board's efforts to use a construction program to achieve desegregation. The problem, of course, is the fact that the Board does not control where people in our mobile society will live (R. 385).

We cite this example not by way of showing the difficulty or pointing out a failure and we trust that the Court will not consider it in that light. We cite this example purely in support of the Board's position that it is dedicated whether it be in the area of construction, facilities, activities, pupil assignment, or teacher assignment to achieve a racially desegregated and non discriminatory school system. Certainly this example shows that this objective is not easily obtained but the fact that results may not always be as desired has not in any sense lessened the Board's determination to make every effort to achieve a desegregated system.

The foregoing examples support our statement made earlier in this brief that we believe this Court has established three criteria to meet its demand for a non-discriminatory school system. These examples demonstrate that this school system meets the third and perhaps the most important of these criteria, namely, a dedication to achieve a total non-discriminatory system.

C. The Board's Supplemental Plan

Further evidence of the Board's dedication to this third criterion is reflected by the Supplemental Plan. We wish to emphasize that this plan was the product of a school superintendent and a Board who are dedicated to complying with what they deem to be both the letter and the spirit of the law. It was not the result of the decision

of a judge who, while learned in the law, may be somewhat isolated, thus inexperienced, in the field of education. Rather, it was a voluntary program devised after many days of study that this Board genuinely believes will accomplish something for good race relations not only in the school system but in the entire community.

Respondents are pleased to note that during the trial, petitioners, on two occasions, commended the Supplemental Plan (R. 372, 397).

The testimony of Mr. Stimbert, the Superintendent, beginning page 339 of the Record, and of Mr. Bailey, the elected President of the Board, beginning at page 395, details the background of the plan, the people who helped to formulate it, and the commitment of the Board to see that it is successful. We shall not lengthen this brief by repeating the testimony of these officials but will summarize their statements by saying that this is the Board's sincere effort to penetrate the wall of racial isolation with the hope that it will bring racial harmony to the community and quality education to the schools.

We have attached to this brief the Supplemental Plan and we shall not detail its provisions except to note that a highly qualified Negro school principal has been appointed Director of Race Relations[6] and is presently administering programs to achieve the objectives of the plan. It is important to state also that the Board is funding this program without Federal assistance. This funding includes not only the salaries involved but, quite naturally, such a program requires a certain amount of transportation. This transportation is either furnished by facilities

6. The District Court directed that the Board should change the title of the Director of this program from "Director of Human Relations", as suggested by the Board to "Director of Desegregation" (19a). Subsequently, the Court approved the title "Director of Race Relations".

the P.T.A., or to the extent funds are available, the Board rents county school busses and drivers during the mid-day hours for this purpose.

We have appended to this Brief one of the reports reflecting the actual operation of the Supplemental Plan (b).

D. The Board's Assignment and Transfer Policies

Assignment and transfer policies presently applicable were worked out by the Board and the Department of Justice in 1966 and were filed in the District Court on July 22, 1966, as a part of the modified plan of desegregation. These policies were incorporated in the Board's plan filed pursuant to the District Court's decision of May 15, 1969 (b).

Specifically, the Board's plan provides, first, that each pupil shall be assigned to the *unitary* school zone within which the student's residence is located. The Board is then obligated under the revised plan to grant transfers so long as the physical facilities at the school to which the transfer is sought are adequate. With respect to transfers from a school in which the pupil is in the racial majority to a school in which he would be in the racial minority, these transfers are granted almost unconditionally and, as appears from items 3 and 5 of Section IV, preference is given to a transfer which will achieve greater desegregation.

It is to be observed that not only is no person ". . . effectively excluded from any school because of race or color", as directed in *Holmes County*, but the reverse is true—transfers to achieve greater desegregation are given preference.

As the District Court's Opinion states, the primary thrust of petitioners' proof and argument was that all trans-

fers, except majority to minority, should be eliminated. The District Court found, however, that in some instances the Board's transfer policies aided desegregation; thus, petitioners' position actually does a disservice to Negro students and those whom petitioners purport to represent (13a). As an example of our criticism of petitioners' position in this respect, we refer to Northside High School. As we have noted, it is one of the newest high schools in the system and the most expensive school ever built in Memphis. If petitioners' position is sustained, then 258 Negro students who transferred into Northside would be denied the right to attend a desegregated school since their transfers were to a school in which their race was in the majority. Refer again to the Vollentine School. Sixty-one Negro students transferred from the Hyde Park School into Vollentine where their race is in the majority. These children would be denied the right to attend a desegregated school.

Or, look at the other side of the coin. The Board closed Patterson School and assigned those Negro students to White Station which had previously been an all white school. The present enrollment at White Station Elementary School is 391 white pupils and 127 Negro pupils. While these 127 Negro pupils remained in their neighborhood school, two Negro pupils sought and were granted transfers to predominantly Negro schools. In White Station, grades 1 through 12, nine Negro students sought transfer to predominantly Negro schools. Must the Board deny these black students a minority-to-majority transfer and the right to attend the school of their choice, if for some reason *other than race*, they choose to attend a particular school?

Petitioners' position ignores these Negro students in their zeal to insure that the 1 or 2 white students that are

zoned in the Carver or Manassas zone are compelled to attend those schools.[7] It is interesting to observe where those students attend school. Almost without exception, transfers these students receive are to a desegregated school. They are not transferred to a school with an all white enrollment. For example, the white students in the Carver and Manassas zones attend Central, a heavily desegregated school, and the tendency of such transfers is to retain the desegregated status of the school to which the pupil transfers.

The Board's transfer policy must be considered also in the light of the residential housing patterns that exist in this community. The inner city is either heavily black or desegregated; while the outer city is almost exclusively white. The black students in the inner city cannot readily transfer to all white schools in the suburban area and, conversely, because of the same transportation difficulties, a white student cannot readily transfer to the predominantly black school in the inner city. Black students do have the opportunity, however, under the Board's

white student cannot readily transfer to the predominantly black school in the inner city. Black students do have the opportunity, however, under the Board's policy to transfer to such desegregated schools as Northside, Vollentine, Central, White Station, Bruce, Bellevue and many other schools, even though in some instances their race may be in the majority. If the Court grants to petitioners the relief which they seek with reference to transfers, this opportunity will be denied to these black students. Of course, one white student would be assigned to Lester and two or three to Booker T. Washington, but we doubt that much would be achieved by such assignments.

In concluding this discussion, we wish to respond to the statement on page 6 of petitioners' brief that the Board "frankly admitted" that it seeks to retain its transfer pol-

7. The District Judge carefully analyzed the insignificant effect of cancelling such transfers (14a).

icies so as to permit students desiring to avoid desegregation to do so. This assertion is false. The District Court found that the Board's transfer policies promote school desegregation and that finding was eminently correct.

E. Criticism of the Court of Appeals

The Court of Appeals is criticized for its decision that Memphis has a unitary school system.[8] With somewhat more dubious motives, the Court is criticized for not summarily granting petitioners' several motions. The tenor of this latter criticism carries with it the implication that the Court of Appeals has engaged in dilatory tactics so as to frustrate or delay the granting of petitioners' rights. This criticism is wholly unwarranted.

The delay in hearing petitioners' case was due in large part, if not solely, to the fact that petitioners did not see fit to order the transcript of the proceedings in the District Court. When this oversight was discovered, respondents requested that the transcript be prepared. We called the attention of the Court of Appeals to the fact that petitioners sought a decision of that Court without the transcript of some eight days of testimony in the District Court.[9] We suggested that a case of such importance to this school system should not be decided summarily. The Court of Appeals agreed with this suggestion. Of course, there is no way to determine how much more promptly the Court of Appeals could have acted upon petitioners' several

the District Court. When this oversight was discovered, respondents requested that the transcript be prepared. We called the attention of the Court of Appeals to the fact that petitioners sought a decision of that Court without the transcript of some eight days of testimony in the District Court. We suggested that a case of such importance to this school system should not be decided summarily. The Court of Appeals agreed with this suggestion. Of course, there is no way to determine how much more promptly the Court of Appeals could have acted upon petitioners' several

8. This is the same Court of Appeals that is cited on page 3 of Petitioners' brief as having found that Memphis school zones had been "gerrymandered". The panel in 1964 was comprised of Judges Weick, O'Sullivan and Cecil, while the panel in 1969 was comprised of Judges Weick, O'Sullivan and Celebrezze.

9. Even now the transcript includes only the hearing of petitioners' proof and respondents' rebuttal held on February 6 through 11, 1969. A major portion of respondents' case was presented on August 23 and November 8 and 11, 1969. This transcript has been ordered.

motions if petitioners had seen fit to order this transcript. Suffice it to say that it appears somewhat unseemly to criticize the Court of Appeals for delay in view of petitioners' own oversight.

The Court of Appeals may not have indulged in that instant justification that some of these cases from other jurisdictions may warrant. It acted, however, with exceptional promptness. First, it directed the District Court Clerk to forward all exhibits in the case as soon as petitioners' first motion was filed even though the transcript had not even been ordered. As soon as the Court of Appeals received a portion of the transcript it immediately set the cause for argument and its decision in the case was rendered two days later.

I. The So-Called Indicia of a Dual System

Before presenting our argument, we would like to respond to what petitioners call the indicia of a continuing dual system (pp. 11-). Petitioners seek support for this charge by quoting from the Opinion of the District Court. As we read that quotation, it simply states the opposing positions of the parties and does not conclude that school zones have been gerrymandered.

Petitioners attempt to support this charge [illegible] ing the conclusion of their Title VI expert [illegible] that the existing zone lines followed traditional boundaries between Negro and white neighborhoods [illegible] gerrymandered. That effort fails. Apart from the remote [illegible] testimony on frequent occasions that he had formed no opinion as to the Memphis system because he had not devoted sufficient time to a study to permit him to reach conclusions (R. 66-70, 108). The most patent failure, however, rests in the very first example referred to by Dr. Foster (the oft-cited Kleinfeld-Valentine area) (R. 40-

Klondyke has all black enrollment but the enrollment at Vollentine in 1968 was 197 white and 213 Negro students. The other examples he gives together with the school enrollment are Maury (181 white and 48 Negro), Bruce (422 white and 81 Negro) and Merrill (217 Negro and 27 white).

It will be observed that each of the examples reflects a change from predominantly white to predominantly Negro. Short of racial balance we believe that these schools are examples of excellent pupil desegregation rather than gerrymandering. If these schools and the schools cited on page 3 of the petition are examples of this Board's efforts to gerrymander, then we must be a disappointment to the bigots that petitioners [illegible] we undertook to serve.

A final statement is required by the reference to the Court of Appeals decision in *Northcross*, 333 F. 2d 661. That opinion was critical of the Vollentine zone lines. That decision was rendered in 1964 and now, five years later, petitioners still must rely on this event even though the enrollment at Vollentine is about as ideally balanced as any school in the United States.

With equal opportunity to demonstrate respondents' good faith, it should be observed that within days after the Court issued its mandate in 1964 the Board revised its zone lines. Copies of the revision were promptly furnished petitioners' counsel, as soon as the Court's mandate was spread of record. Within a matter of days prior to the date within which petitioners' counsel must designate any additional school zone which they felt was not unitary, they [illegible] to Motion Docket Jan. 31, 1964. No complaint was made to that request nor was any objection registered to the revised school zone maps. Almost annually since 1964, the Board furnished with the District Court revised school zone maps and maps or tables showing the racial makeup of each school and the names and addresses of pupils enrolled in the various schools.

Now, five years later, the charge of gerrymandering is revived and, most remarkably, they seek to support that charge by reference to a school whose enrollment almost precisely reflects the racial balance of the entire system.

ARGUMENT

As we view *Holmes County* and *Carter*, No. 944, O. T. 1969 (Aug. 4, 1970), they resolved school boards that, according to the Court of Appeals for the Fifth Circuit, were still operating dual school systems. In the case at bar the Sixth Circuit holds that Memphis is not operating a dual system—that it has achieved a unitary system. The marked distinction between *Holmes County* and this case would seem to dictate that we first respond to Part II of petitioners' argument since Part I of that argument contains the circuitous assumption that the Court of Appeals' decision is incorrect.

I. What Is a Unitary System

One review of *Carter* lends little assistance to defining unitary schools. The most recent guide for a definition of the term appears in Justice Black's Order in *Holmes County*. There it is stated:

> "1. The Court of Appeals' order of August 28, 1969 is vacated, and the cases are remanded to the court to issue its decree and order effective immediately declaring that each of the school districts here involved may no longer operate a dual school system based on race, or color, and directing that they begin immediately to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color."

And in *Green* this Court stated:

> "... School boards such as the respondent then operating dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system *in which racial discrimination would be eliminated root and branch*." 391 U.S. at 437.

Let us consider the Memphis system in light of those statements.

A. Memphis Operates a Unitary System

Memphis, as does every other urban school system in the United States, operates what are termed neighborhood schools. In Memphis every student, regardless of race, is now and has been for a number of years, assigned to the school serving his unitary zone of residence. No student, whether for race or any other reason, is excluded under any circumstances from the school serving his unitary school zone.

Memphis, however, goes further than that in that students are permitted transfers and, as we have noted, preference is given to a student if his transfer will tend to increase school desegregation. Not only, therefore, are students not excluded from any school because of race, but on the contrary, racial factors are considered only if desegregation is aided. Certainly Memphis meets the "unitary" rule in *Holmes County*.

Further demonstrating our compliance with *Holmes County* and *Green*, it must be noted that respondents have taken numerous affirmative steps to remove discrimination "root and branch" and to encourage desegregation. Voluntarily, the board desegregated faculties and its interscholastic athletic programs. Voluntarily, schools with black enrollment were closed so as to desegregate adjacent

white or desegregated schools. The most expensive school ever constructed by the Memphis system was located in an effort to preserve the desegregated characteristics of a neighborhood, and there were other instances which we have heretofore noted in this brief such as the attitude of the professional association which reflects the attitude of this Board in the field of race relations.

B. Memphis Has Long Complied with Holmes and Green

The Court's Opinion in *Holmes County* does not recite local conditions in the systems there involved but since its petitioners have so frequently noted, Memphis is adjacent to Mississippi, we know and we believe that this Court is aware that Memphis has operated its schools in a fashion somewhat different. In *Green*, *Raney* and *Monroe*, essentially the same conditions existed as were presented in *Holmes* county. Justice Brennan noted in *Green*:

> Racial identification of the system's schools was complete, extending not just to the composition of the student bodies at the three schools but to every facet of the school operations—faculty, staff, transportation, extracurricular activities and facilities. In short, the State acting through the local school board and school officials organized and operated a dual system, part White and part Negro. 391 U.S. at 435.

The Memphis system is dual, part white and part Negro. Of the pupils it contains and in spite of the neighborhood racial patterns, 40% of all black students attend school with white students and 78% of all white students attend school with black students. And again we remind the Court that the elimination of discrimination has been emphasized

C. Racial Balance

Let us now discuss what we deem to be the dominant issue in this case, racial balance. Petitioners' position, stated quite candidly and directly to the Court of Appeals, was that in order to achieve the label of "unitary" each school within the system must be racially balanced. That Petitioners would permit a 10 per cent variance. In Memphis each school must have approximately 54.3 per cent Negro students and 45.7 per cent white students.

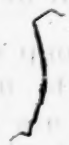
Racial balance, of course, means that pupils must be transported to obtain the required enrollment percentage and the neighborhood school concept is no longer a Constitutionally acceptable method of school assignment in the public schools. It is time that this Honorable Court speak on this issue since there are far too many Courts, like the IV Circuit experts and HEW representatives who have been persuaded that this, and only this, will mean a return to this Court's requirements for a unitary system.

It is interesting to observe the adroit way in which petitioners treat the question of racial balance in the Court. It is mentioned only in footnote 9 on page 30. As mentioned quite clearly to the Court of Appeals, Opinion, this issue was presented more candidly to them in that Court.

The reason for the non-mention of including the issue here is quite simple. Petitioners do not want a decision of the Court ordering racial balance. They could read a decision of the Court to mean the Memphis school system goes to the Title IV Centers. It is hoped that means that the Constitutional requirement for racial balance remains.

Of course once the District Court is trapped by a Title IV plan that requires racial balance it becomes difficult to defy petitioners and the so-called outside expert who has been called upon or directed to aid the Court.

We appreciate full well that this Court has never rendered an Opinion directing racial balance in the public schools. In that regard the Court of Appeals stated:



segment of population between the ages of six and seventeen. In a lawsuit involving the views of the segregationists versus only the views of the N.A.A.C.P., someone must win and someone must lose. Unfortunately, therefore, these important issues are decided by the Court without hearing the voices of most of the people whose views are represented neither by the N.A.A.C.P. nor the segregationists, but the law of the land in the area of school desegregation is written by the Court in a controversy between these two extremes as they become, when they confront each other.[11]

In this connection it is worth noting, as evidenced by the Opinion of the Court of Appeals which has followed the progress of this school system since 1962, that this Honorable Court is not reviewing the operation of a defiant or recalcitrant school board, even though petitioners seek to paint that picture. Nor is the Court considering the decisions of reluctant appellate and district courts. On the contrary, this Court is considering the action of a school board and courts who have demonstrated their dedication to complying with "the law of the land".

We do not, however, want "the" law of the land established by petitioners and their Title IV "experts"[12] who thus far have applied their views on selected school systems only. If racial balance is the law, then it should be stated, so that it will be uniformly applied rather than

11. Of necessity some of our comments can be deemed critical of the Legal Defense Fund. In making these critical comments, we do not intend in any way to detract from the vitality that group for its past achievements in the field of human and Constitutional rights. But any group or organization can err and while we respect the Fund greatly for its past achievements we would be less than candid if we did not comment on a position which we deem damaging to education.

12. The Memphis school system has been unimpressed with the Title IV representatives and we respectfully urge the Court to note the qualifications and background of petitioners' expert in this case (R. 109-112, et seq.)

discriminatorily applied to those school systems who have been misguided by some political figure who gains notoriety only for his bigoted views.

Perhaps the most remarkable facet of all of this is the difficulty that one has in speaking for the great majority of the people and all of the school children. Those represented by the Fund say "racist" if the programs which they devolve to get even with the segregationists are not adopted. By the same token, the segregationists attack with a louder voice if their "segregation-forever" philosophy is not followed. Generally, the Courts have only these two courses to follow in this major battle that shapes educational programs in this country. The Courts are caught on the horns of a dilemma—Do we follow the segregationists' philosophy, or do we follow the programs suggested by the N.A.A.C.P.? That decision is not a difficult one to make, given only those two alternatives. But we respectfully submit that there is a third course and the Memphis School System gives the Court an opportunity to take that course by giving the Board's Supplemental Plan an opportunity to produce results.

D. In Defense of Neighborhood Schools

In the District Court, just as here, the principal thrust of petitioners' case was its prayer that the Title IV experts prepare an integration plan for Memphis.[13] Racial balance was treated most deferentially. As a result, no proof was introduced by respondents to explain or defend the neighborhood school concept, which as we have

13 As we have noted, employment of Title IV experts is practically tantamount to ordering racial balance; hence, petitioners need not directly propose this course. Regrettably to a Title IV expert, racial balance is an attractive vehicle. It is a simple mathematical computation that produces a result, but a result that gives no consideration to children, white or black, nor to education. It requires no thought or ingenuity such as that demonstrated by this Board's Supplemental Plan.

noted, is the fundamental method of pupil assignment in practically every urban school system in the United States.

We can, however, defend this concept with matters of common knowledge and reference to judicial decisions. *Deal* is perhaps the leading case that directly meets the issue of racial balance. We quote that Court's statement concerning the neighborhood school:

> "Appellants, however, pose the question of whether the neighborhood system of pupil placement, fairly administered without racial bias, comports with the requirements of equal opportunity if it nevertheless results in the creation of schools with predominantly or even exclusively Negro pupils. The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and administration through the use of neutral, easily determined standards, and better home-school communication. The Supreme Court in *Brown* recognized geographic districting as the normal method of pupil placement and did not foresee changing it as the result of relief to be granted in that case. *Brown* v. *Board of Education*, 347 U. S. 483, 495, note 13, question 4 (a), 74 S. Ct. 686, 98 L. Ed. 873; *Brown* v. *Board of Education*, 349 U. S. 294, 300-301, 75 S. Ct. 753, 99 L. Ed. 1083 (1955). But see *Blocker* v. *Board of Education of Manhasset*, 226 F. Supp. 208, 221-222 (E.D.N.Y. 1964).
>
> "Because of factors in the private housing market, disparities in job opportunities, and other outside influences (as well as positive free choice by some Negroes), the imposition of the neighborhood concept on existing residential patterns in Cincinnati creates some schools which are predominantly or wholly of one race or another. Appellants insist that this situation, which

they concede is not the case in every school in Cincinnati, presents the same separation and hence the same constitutional violation condemned in *Brown*. We do not accept this contention. The element of inequality in *Brown* was the unnecessary restriction on freedom of choice for the individual, based on the fortuitous, uncontrollable, arbitrary factor of his race. The evil inherent in such a classification is that it fails to recognize the high value which our society places on individual worth and personal achievement. Instead, a racial characterization treats men in the mass and is unrelated to legitimate governmental considerations. It fails to recognize each man as a unique member of society.

"In the present case, the only limit on individual choice in education imposed by state action is the use of the neighborhood school plan. Can it be said that this limitation shares the arbitrary, invidious characteristics of a racially restrictive system? We think not. In this situation, while a particular child may be attending a school composed exclusively of Negro pupils, he and his parents know that he has the choice of attending a mixed school if they so desire, and they can move into the neighborhood district of such a school. This situation is far removed from *Brown*, where the Negro was condemned to separation, no matter what he as an individual might be or do. Here, if there are obstacles or restrictions imposed on the ability of a Negro to take advantage of all the choices offered by the school system, they stem from his individual economic plight, or result from private, not school, prejudice. We read *Brown* as prohibiting only enforced segregation." 369 F. 2d, at 60, *cert. den.*, 389 U. S. 847, 88 Sup. Ct. 39, 19 L. Ed. 2d 114.

Of necessity, Courts approach racial balance, and pupil transportation to accomplish racial balance, from a purely legal standpoint. An educator must approach this problem from the standpoint of education and what the transporta-

tion of tens of thousands of children across the city twice each day will mean to those children and to their education.

As noted, only briefly was this subject referred to in the District Court (R. 349-350) but simple common sense supports the educator's objection. Consider, first, the financial aspects of racial balance. Unlike rural systems, Memphis does not furnish transportation to students except those who are physically handicapped or are awaiting the opening of a new school (12a). But with those few children we know that it costs approximately $70.00 per year per student. With an annual expenditure of only $518.00 per year per pupil in Memphis, it can be readily seen that school transportation for a major segment of our school population is simply a luxury that Memphis and most school systems cannot afford. The District Court was well aware of the competition which this Board faces for its share of the tax dollar (12a).

But as compared to children, finances are secondary. What does racial balance do to children? Consider disruption of the pupil's day. Transportation over the clogged streets of a city differs markedly from transportation over the comparatively vacant highways of the rural community so that a substantial portion of the pupil's day will be spent in the heretofore simple process of getting to his neighborhood school. Traffic conditions during the opening hours of school are already hazardous and pupil transportation would only increase the safety problem for school children and the community.

Consider next the ever-increasing problem of school attendance. For many, attending school is not the most attractive thing that they do. How much less attractive will school become if the child must leave an hour earlier than usual and return home an hour later? Further, it is a matter of common knowledge that many students work

after school as newsboys or in a variety of other fields and a bussing program will effectively eliminate the income and the training which those students derive from their employment.

Perhaps most important of all of the factors to be considered is the effect on recreation, organized activities and the social life of the people in the low economic neighborhoods. In those neighborhoods, social activities and enjoyment are almost invariably tied to three areas—the church, the school and the community house or park, with the school furnishing the common area at which all children can meet and to which all parents can be invited for educational, cultural or social programs. These people do not have the country club or the university club of the more affluent. Thus, if a substantial portion of those children, black or white, are assigned to attend schools in areas remote from their neighborhoods, the use of schools for these extra-curricular, social and cultural activities will be sharply curtailed, if not eliminated. A school principal and faculty simply cannot establish that rapport with children who are not their students to make the school useful for such purposes.

Finally, consider what at first might seem to be a minor factor—communications between the school and the home. In cases of illness or discipline, there must be contact between parent and principal or teacher. In this day of such a mobile society,[14] this is already a problem but that problem will only be magnified, to the harm of children, by the remoteness resulting from racial balance.

Aside from the foregoing, racial balance is an administrative absurdity, as evidenced by the enrollment figures in this school system. In 1961 total enrollment in Memphis

14. In Memphis 6,000 addresses are changed each 20 days (R. 385).

was 103,716. Of that total 54.2 per cent were white and 45.8 per cent were Negro. In 1965 and 1966, the enrollment by race was essentially equal. By 1969, the 1961 racial ratio was precisely reversed in that only 45.7 per cent of the enrollment is white. To meet these statistical changes and to retain racial balance would require the reassignment of numerous black and white children each year. No child could feel secure in his school assignment.

Already too few people give consideration to children in the attack on those who proclaim "Segregation Forever" and when this fact is compounded by the mobility of our society and the impermanence that many children already have with their surroundings, it would seem that this Board's Supplemental Plan offers a more effective and more workable alternative to racial balance.

We do not question the sincerity of the petitioners in their zeal to compel racial balance. Nor do we question the sincerity of a court that would order this to be done. We do believe, however, that such a decision will do harm to both race relations and education and those are the two areas that this Court and this Board are dedicated to improving. We also appreciate full well that should this Court render a decision directing racial balance, it will be done in all sincerity and based on sound judgment that the Fourteenth Amendment to the Constitution compels such a decision. But while realizing the sincerity of the Court, we know that people who are equally sincere can do grievous harm to valuable public institutions and the Court's sincerity would be little compensation if we are right that racial balance may only be achieved by the transportation of thousands of school children and the very serious disruption to public education that would ensue.[15]

15. At several points in their short brief, petitioners seek to influence the Court's decision in this case by reference to what has happened to our neighbors in Marshall County, Mississippi.

It is time now for the Court to lay the ghost. It is time for the Court to announce to this unsettled country, both black and white, that desegregation of a public school system does not require balancing of the races—that once discrimination has been eliminated "root and branch", children may attend their neighborhood schools.

E. The Memphis Plan Is Superior to Racial Balance

What is the goal which this Honorable Court seeks? We believe that the Court is saying to educational systems in the country that they must exert their full efforts to breaking down the wall of racial isolation. Assuming that to be true, how then can it best be accomplished?

We most respectfully urge that in considering these questions, the Court study this Board's Supplemental Plan. It would, perhaps, be too much to expect that this plan is going to produce an instant end to racial bias in the community. The reason for this is quite simple. This Board does not have the opportunity to educate parents nor to control where parents move with their children. We do have the opportunity to educate children, where the future of our country lies, and through this Plan, we know that much will be accomplished between black children and white children in the field of race relations.

II. The Grant of Certiorari and the Motion for Injunction

We shall now comment on petitioners' Motion for Injunction and that section of the Petition styled "Reasons

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They note that at long last, the children they represent in Marshall County have finally been given their Constitutional right to attend a racially-balanced school by being transported each school day across Marshall County, while the children that petitioners represent in Memphis have the right only to attend their neighborhood school or any other school in the City of Memphis that they choose if their attendance at such other school will increase the amount of desegregation.

for Granting the Writ". As a preface to these comments, we wish to repeat a statement that we made earlier in this brief—The Memphis School System has achieved as much, if not more, school desegregation as any other major system in the United States. Petitioners refute this statement only by playing the statistical game under their own set of rules.

A. An Injunction Is Not Warranted

The Motion for Injunction may be divided into two sections. In the first section, petitioners cite authorities supporting the Court's right to issue the injunction. In view of the decision in *Carter*, respondents must concede petitioners' point that the Court has full authority to issue the injunction. The question, however, is not that simple. The question does not concern the authority of the Court but whether, on the merits and considering all of the facts of the case, this Court should exercise this extraordinary jurisdiction. We respectfully suggest that it should not.

The second section of the Motion for Injunction is petitioners' rather unique approach to the issue of racial balance. They do not ask the Court to reverse the Court of Appeals' holding that racial balance is not required. They do not meet the issue that so concerns educators throughout the country. In fact, the casual reference to this question in their brief lends the impression that they do not want the Court to meet this issue. Certainly their Motion for Injunction does not refer to this issue. Their prayer in the Motion for Injunction is a very simple one—requiring the Memphis Schools to prepare "with the assistance of H.E.W. or the H.E.W.-Funded University of Tennessee Title IV Center a plan of complete integration". That sounds somewhat innocuous.

Respondents know now, though they did not know in the District Court, that a requirement for a Title IV Plan

is but a sophisticated way of imposing racial balance on this school system. We ask petitioners to respond to this statement. Petitioners should be as direct with this Court as they were with the Court of Appeals.

The question, therefore, in the injunction application is quite simple—Should this Court precipitately or otherwise grant the injunction without argument and without the due consideration normally given to litigants by this Court, reverse the Court of Appeals and by the injunctive process, impose racial balance on the Memphis School System? We do not believe that such hasty action is warranted for a school system that has as much, if not more, racial desegregation as any other system in the United States.

B. Should the Court Grant Certiorari

In one sense, respondents join petitioners in their prayer that this Honorable Court grant the writ. Naturally our reasons for this joinder are different from those stated by petitioners.

This is an unusual position for a respondent to take but we take this position out of a sense of responsibility to educators and school children throughout the country because we desire so strongly that this Court establish the law of the land with respect to racial balance—this educational and administrative absurdity. This topic is becoming too important for the Court to ignore the issue. But the question should be resolved in an atmosphere of reasoned judicial consideration and not by injunctive process. Memphis, Tennessee, or Marshall County, Mississippi, should not be required to racially balance their schools if the schools in Albany, New York, Bismarck, North Dakota, or Seattle, Washington, are not balanced. In a word, whatever the law is with respect to racial balance, it should be

the law of the land and not an administrative ruling decreed by those who think they are reflecting what this Court requires for certain school systems only.

1. A Suggestion for the Court's Consideration

The issue of racial balance and the bussing of children to achieve that balance was not tried in the District Court. In fact, it is only in recent months that petitioners and their Title IV experts have begun using this tool. It would seem appropriate, therefore, that before this Court establishes such a far-reaching principle that will consume millions of dollars otherwise devoted to education, it would be wise to investigate in depth the impact of racial balance on both Constitutional rights and education. We propose and respectfully request that this Court consider the appointment of an outstanding individual or group, learned in both the law and public education, to serve as a Special Master or Special Panel to investigate this question from both an educational standpoint and a Constitutional standpoint. This Special Master should report to the Court his findings with respect to the impact on all children, black and white, and the impact on public education of a requirement for racial balance. We trust that the Court will not consider this suggestion as in any way a reflection on the ability of the Court to resolve this complex problem. We know and deeply respect the fact that this Court is learned in the law. On the other hand, we know that this Court is somewhat inexperienced in the field of public education and we believe that the Court will want all of the information that it can possibly acquire with respect to this important question before making a decision that will have such a tremendous impact on literally millions of children and hundreds of school systems.

C. What Constitutional Rights?

Petitioners' brief contains this statement:

> ". . . A Negro child in Marshall County, Mississippi, is granted his constitutional rights by order of this Court, while a Negro child across the county (and State) line a few miles away is denied these rights by the decision of a Court of Appeals. In view of the possible effect on all school districts, and in particular those within the Sixth Circuit, this Court cannot allow such different treatment to go uncorrected." (Pg. 15).

Consider for a moment the Constitutional rights that the Negro child across the County line from Memphis has now achieved through petitioners' efforts. The right is simply this. He has been taken from his neighborhood school and transported across Marshall County to attend a school that is unfamiliar to him and that contains few, if any, of his close friends.

We wonder how that child feels. As the Court of Appeals noted in its *Deal* decision, if that child or his parents want him to attend that school, well and good. He should be allowed to attend the school of his choice. As Justice Black said in *Holmes County,* no child should be excluded from a school because of his race. But it just so happens that there are a vast number of the children whom petitioners purport to represent who do not desire to be transported halfway across town, to lose contact with their neighborhood and to attend an unfamiliar school. To these black children the so-called Constitutional right which petitioners obtained for them has, instead, become a burden they must bear. In the City of Memphis as this brief is being written, the District Court is conducting a hearing and the principal issue is racial balance in the Shelby County schools. Many people look at this problem in the light of the white child only and the white child, since

his parents were "racists", should be bussed across the community as a form of penance. It can only be penance because it has nothing to do with good race relations or good education.

Remarkably enough, news accounts of that trial reveal that Negroes are finally speaking up and renouncing this so-called "Constitutional right" that is not being given them but, rather, is being forced upon them. They are now appearing to express their views that they do not want their children taken from the neighborhood school. The attitude of these black parents would indicate that racial balance is as vicious and insidious in its way as racial segregation is in its way.

We refer again to the City of Houston. On December 31, 1969, in the cause *Ross v. Houston Independent School District*, Civil Action 10444, U.S.D.C., S.D. Tex., the Houston School system filed a detailed report with the Court and two aspects of that report will be of interest to this Court. First, the report reflects the approval of a Citizens Committee of Houston's "Freedom of Choice" plan. The Committee, which consisted of citizens chosen to represent *all groups* within the school district, recommended against bussing. Next, the Houston report reflects the results of a referendum of school patrons on the freedom of choice plan in the Houston District. We quote from the report:

> ". . . In the recent election a referendum was submitted to the patrons of the Houston Independent School District. It referred to the patrons the question of their support of the present freedom of choice plan. The results of the referendum are that all neighborhoods within the District, including Negro neighborhoods, overwhelmingly support freedom of choice. See Exhibit "C", pages 1 through 14.'

This Court would be interested to know that freedom of choice was approved in 332 of the polling places, while 3 precincts rejected freedom of choice. Consider for a moment the impact of such a referendum. 78,126 Negro students and 157,246 white students are enrolled in the Houston District. Yet in all but three precincts out of 335 parents supported freedom of choice. Consider what the result would have been if the question presented in the referendum had been racial balance and transportation of pupils. Can anyone say that the Constitution of the United States forces on people a so-called "right" which they do not want. We think not.

CONCLUSION

The day that discrimination was eliminated in this school system has long passed. For several years every black student in Memphis has had the right to attend the school of his choice. In fact, the emphasis has been to encourage these children to enroll in a school where the opposite race predominates.

The next era in the desegregation process in Memphis was to find other areas that could serve as a vehicle for achieving an integrated system as opposed to one that simply is free of discrimination. Voluntary faculty desegregation, school construction and the voluntary closing of schools, even over the objection of the patrons whose children attend those schools, are but a few examples of the Board's action both to achieve integration and to make integration as attractive as possible.

With the filing of the Supplemental Plan, we have entered the third era in the desegregation process. While the Board will continue these other programs, it must be recognized that the school system has no control over parents and where they move with their children. The Board

can, however, attempt to educate children to the fact that there are two races in this country which can become acquainted and must attempt to live in harmony. The Supplemental Plan will do this. Perhaps it may not produce the desired result *now* because it deals with children and not their parents.

The very least that can be said is that for the first time and after ten years of litigation, the school system has done something that initially, though only initially, received petitioners' approval (R. 372, 397). The most that can be said is that this Court has before it a board dedicated to justice and a relentless and educationally sound pursuit of the *now* result.

We respectfully ask that this Honorable Court follow a course that will announce to children, to educators, and to the country that racial balance is not the "law of the land."

Respectfully submitted,

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GROWTH PATTERN OF CERTAIN DESEGREGATED SCHOOLS

School	1961-62		1962-63		1963-64		1964-65		1965-66		1966-67		1967-68		1968-69	
	WHITE	NEGRO	WHITE	NEGRO	WHITE	NEGRO	WHITE	NEGRO	WHITE	NEGRO	WHITE	NEGRO	WHITE	NEGRO	WHITE	NEGRO
Bruce	560	3	522	5	494	7	488	9	443	11	432	19	430	40	412	63
Gazelle	349	4	343	11	312	70	279	139	265	224	199	385	159	460	85	553
Springdale	328	2	284	8	245	51	245	94	174	205	94	246	16	341	15	414
Cordon	330	4	320	13	291	110	160	196	138	282	113	417	54	562	27	627
Peabody			420	4	428	6	446	9	444	7	460	20	453	21	431	39
Valentine			406	1	391	4	399	33	320	83	293	177	227	215	197	213
Avon					553	1	493	2	432	30	414	34	361	40	322	41
Idlewild					490	2	460	9	473	25	460	30	437	39	439	43
Maury					266	10	247	9	265	18	233	28	181	44	182	41
Pope					490	3	627	3	619	20	539	108	410	205	337	307
Sherwood					1275	14	1244	22	1157	21	1103	31	1033	24	929	30
Hollywood					371	5	193	238	82	528	17	733	5	837	--	814
Cathey Grove							455	9	367	120	315	143	275	156	230	137
Longview							870	1	592	265	184	933	50	1159	16	1290
Cathcart							436	5	434	75	355	135	355	240	173	450
Hillory Heights											259	3	194	194	112	279
White Station													420	106	341	110

Memphis City Schools

APPENDIX A1

SCHOOL	1965-66		1966-67		1967-68		1969-69	
	WHITE	NEGRO	WHITE	NEGRO	WHITE	NEGRO	WHITE	NEGRO
JUNIOR								
Bellevue	614	63	550	86	537	136	504	194
Fairview	731	55	601	89	480	76	355	121
Humes	488	462	407	582	397	1129	188	1194
Longview	440	143	199	433	44	450	18	758
White Station	726	75	788	79	834	57	756	46
SENIOR								
Central			1178	33	1084	66	1021	115
Northside					234	932	75	1240
South Side			221	426	79	1017	19	1412
Tech *			857	82	790	137	749	181
White Station			1231	52	1337	45	1397	45

* 1963-64

PROPOSED PLAN OF BOARD OF EDUCATION

Comes the Board of Education of the Memphis City Schools, defendant herein, and respectfully submits to the Court a proposed plan to aid in the establishment of better relations between the races, not only within the school system but also within the community.

Preface

The historical approach to race relations and public education has been primarily a statistical one. Attention has been focused on an individual school instead of on the school system and community. Almost uniformly the Courts, sociologists and educators examine the individual school, School A, to determine whether School A has bi-racial enrollment. If it does not have such bi-racial enrollment, reassignments are sought to achieve this objective. Too frequently, in fact almost uniformly, after the school has been satisfactorily desegregated and within a period of three to five years resegregation results with little or nothing having been achieved with respect to human and racial understanding.

The Board of Education has given full consideration to various other plans of achieving better race relations. Among some of the methods considered have been school pairing, educational parks and student bussing. Experience in other communities with these ideas, even if financing were available to undertake such programs, led the Board to conclude that a better program must be designed.

The problem presented here is two-fold. First, what can the Board of Education do in the field of human relations in the City of Memphis. Two races live in this city and they can and must live harmoniously. Further polarization between the races and residential transition

should be avoided. Equally important is the Board's obligation to give the court an alternative to the purely statistical approach that has been the polestar in the past. The Board of Education believes that the plan which it here proposes would permit the Court to set goals and objectives that are not statistical in terms of percentages and ratios but are golden objectives in terms of the human equation, human relationships, and better understanding.

Background

Under the present plan of operation the Board of Education has met with statistical success yet in this case the parties continue to litigate and many communities tend to experience racial isolation. In this community each year has seen an increase not only in the number of schools with bi-racial enrollment but also in the number of pupils attending schools with members of the opposite race. Currently 53 of the 143 schools in the system have bi-racial enrollment and more than 47,500 of the 123,000 pupils in the Memphis schools are attending these desegregated schools. It is the feeling of the Board that this has been accomplished consistent with maintaining quality education.

Faculty desegregation has increased markedly. The faculties of all but one school have been desegregated and the number of teachers involved in this process has grown at a rapid pace.

It is the intention of the Board to continue this desegregation process. For example, there shall be continued emphasis on faculty desegregation and boundary lines are studied continuously in order that the facilities of the school system will be utilized not only to the fullest but in the best possible manner from the standpoint of contribution to good instruction.

The Board of Education believes, however, that the time has come in the desegregation process to devote some of its efforts to better racial communications within the entire school system. It is time to reconsider the purely statistical approach—the approach based upon the theory that racial proximity, i.e., bi-racial enrollment in each school, is the factor that will bring about quality education. There is absolutely no empirical evidence that the mere desegregation of a classroom either adds to or detracts from the quality of education in that room. On the contrary, educators have concluded that the influence of one's peers has a greater effect on the quality of education that a student receives.

So let us begin to pledge ourselves to focusing our attention on those elements that improve instruction and that make for quality education in this system. We believe that the supplemental plan we will next describe will produce results in enabling the coming generation to better understand the contributions of other races and what is required of the other if each and all are to contribute to the growth of a community.

The Supplemental Plan

A. The Board of Education shall promptly appoint a Director of Interscholastic Activies who shall serve as a member of the Department of Instruction.

B. It shall be the responsibility of the Director to formulate plans and programs for both interscholastic and extracurricular activities, the dominant purpose of which shall be to acquaint all students in this school system with the achievements, abilities, customs, and the problems and concerns of each other.

C. Initially the Director shall formulate plans in the following areas:

1. *Principal Exchange and Visitation Program.* The present program of temporary reassignment of principals shall be expanded with emphasis on the temporary assignment of principals to schools where the predominant racial enrollment is different from that of the school to which the principal is regularly assigned.

2. *Teacher Exchange and Visitation Program.* There shall be temporary reassignment of teachers for limited periods of time to schools of different racial composition than that to which the teacher is regularly assigned.

3. *Pupil Exchange and Visitation Program.* The opportunities for gaining knowledge of and respect for opposite race can and should be afforded to pupils within this school system. As examples, exchange programs, on a racial basis, shall be started promptly in the following areas:

   a. *Vocational.* Interscholastic activities can be most diversified in this area. Exhibit days will be planned between schools and among several schools. Contests will be scheduled on the basis of quality workmanship in performing certain shop skills. Students and teachers will be exchanged for short periods of time. The various clubs in this area will have more interscholastic activities, using as a guide the existing programs in the field of Distributive Education.

   b. *Arts and Crafts.* Something similar to what has been said about the vocational would apply here. Again the emphasis must be on the interscholastic or the plan will not be effective. Art exhibits, trips to art galleries, and jointly-sponsored speakers, art club affairs and, again, student exchanges. Probably it should be said at this point that student exchanges will not have the detrimental statistical effect that we are now finding in the field of eliminating segregation.

c. *Academic Courses.* Suitable methods of pupil exchange shall be devised so that students shall have the opportunity of attending classes or expanded lecture sessions with pupils of the opposite race.

d. *Music and Debate.* Glee Clubs and Debate Teams are constantly in need of performing programs after having spent many hours of practice. Certainly a mutual respect for talent is imperative and added to this exchange would be complete tours of the school.

e. *Elementary Schools.* The foregoing programs are primarily concerned with high school activities. The opportunities for elementary exchange are no more limited than the high school program. If it makes sense for pupils in School A to take a tour of a bakery or Brooks Gallery, then certainly it makes sense to have that particular group of children know something about the education of pupils in another school in this system. Joint tours of pupils from schools of predominantly different racial makeup will be planned.

4. The Director of Interscholastic Activities shall then begin research and planning in other areas of racial communication and knowledge and submit to the Board of Education appropriate programs for its approval.

5. On or before February 1 and October 1 of the years 1969, 1970 and 1971, the Board of Education shall file a written report with the United States District Court reporting the programs undertaken and the number of pupils by race involved in each of said programs.

Conclusion

In the several instances when the school system's method of desegregation has been reviewed by the District Court, there has been specific expression by the Court that

the Board of Education was acting in good faith. At the most recent hearing of this matter, this conclusion was again stated by the Court. This supplemental plan is an effort by the Board of Education to continue to merit this attitude not just of the Court but of the entire community, that the Board is desirous of accomplishing something in the field of race relations.

This supplemental plan may well not achieve a drastic increase in statistical desegregation. It will have a drastic effect, however, in expanding knowledge and respect of all races and, with that increased knowledge and respect better relations between the races both in the community and in the school system can and will result.

Respectfully submitted,

Board of Education of the
Memphis City Schools

By .....

PROJECT: GUIDANCE IN HUMAN RELATIONSHIPS

All children need an opportunity to meet and interact *voluntarily* with children who are different by reason of race, culture, religion or nationality. If this contact is forced, the effectiveness of the relationship becomes unnatural and ineffective. Counselors share the responsibility of fostering this understanding which teaches respect for other people and stresses the unfairness of judging others without knowing enough to pass judgment or seeing out of one's own biased opinions.

As an experiment in intercultural exchange, a mutual arrangement was made between Mrs. Kate Lester, sixth grade teacher at Treadwell Elementary School, and Mrs. Larline Duncan, sixth grade teacher and chairman of the

sixth grades at Grant Elementary School. Mrs. Lester's class extended an invitation to thirty sixth graders from Grant to be their special guests for an entire school day and participate in the regular classroom activities and experiences. The students were selected by their classmates who chose them on the basis of their citizenship qualifications, since these students would represent their school and community.

Preceding this experience, an orientation period was held at each school. Teachers and counselor participated in this, making each group aware of the purpose, discussing matters of courtesy, ways of communicating, sharing, etc.

In the opinion of both principals and teachers, this was a most successful and rewarding occasion. After the first few minutes of natural tension on the part of both groups, students began identifying with each other, competing as well as cooperating, depending on the type of activity in which they were involved. At one point a "Getting to Know You" game was played, in which students were paired, given five minutes to find out as much about each other as possible and later present one's partner to the class.

By the time of the physical education period, teams were well integrated by the natural selections of the elected captains. At the snack time following this playground experience, there was much interaction among members of the group, including praise and admiration for certain children whose skills had been discovered.

A regular plate lunch was served in the cafeteria, and Mrs. Lester insisted on taking care of this expense through certain available funds, since the principal, Mr. W. A. Bickers, and she had really wanted these children as their guests.

After lunch all of the fifth grade teachers invited the children to visit their various classrooms, view their annual pioneer day exhibits, engage in group singing, games and contests. Favors were presented to the Grant children and this proved to be an exciting and stimulating part of the visit. As a final activity Mrs. Duncan led the group in the singing of "America, the Beautiful" and "God Bless America."

The Grant students, accompanied by their teacher and counselor, left at 2:30 p.m., after much protesting by all of the children that the day had passed just too fast. A chartered bus for transportation was provided by Klondike Guidance Center.

Mr. Charles Irvine, Project Supervisor, and Mr. W. T. Grimes, Supervisor of Klondike Guidance Center, both endorsed the project and visited Treadwell School during the day in order to extend their support as well as share their personal observations with counselor.

Within the next few weeks the Treadwell sixth graders will visit Grant Elementary School and spend the day as their guests. Two of the Treadwell fifth grade teachers have requested counselor to plan similar trips for their classes.

In May, two fourth grade classes from Grant will visit Richland Elementary School and be the guests of that school during their annual Art Week. Mrs. Mildred Hudsen, Richland Principal, and counselor consulted and will confirm these plans in the near future.

Louise Howser,
Counselor

LH/rs

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

DEBORAH A. NORTHCROSS, ET AL., Plaintiffs,

vs.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, ET AL., Defendants.

Civil Action No. 3931

REVISED PLAN OF DESEGREGATION

Comes the defendant, Board of Education of the Memphis City Schools, and files this its revised plan of desegregation as directed by the written Opinion of the Court filed in this cause on the 15th day of May, 1969:

I.

Teachers and Other Professional Personnel

1. Teachers and other professional personnel will be employed solely on the basis of qualifications and without regard to race or color.

2. In the recruitment and employment of teachers and other professional personnel, all applicants and other prospective employees will be informed that the City operates a racially desegregated school system and that the teachers and other professional personnel in the system are subject to assignment in the best interest of the system and without regard to their race or color.

3. The Board of Education will make initial assignments of newly employed and transfers of presently-employed teachers to schools in which the majority of faculty members are of a race different from that of the teacher to be assigned or transferred. Such assignments and trans-

fers will be made by the Board in all of those cases in which the teachers are qualified and suitable, apart from race or color, for the position to which they are to be assigned or transferred.

4. Supervisors, principals, teachers and other faculty personnel shall be employed, promoted and assigned in furtherance of a goal of removing the racial identity of each school. An interim target for this goal shall be that at least 20 per cent of the teachers of the system will be assigned to racially minority faculty positions in the school year 1969-70. This percentage shall be systemwide and shall not necessarily require 20 per cent in each school in 1969-70.

5. Such assignments shall not be left to the choice of the teacher. No teacher shall be discharged from the system to correct a racial imbalance.

6. The Board shall have properly trained personnel conduct appropriate seminars and programs for teachers in the system to prepare all faculty personnel for desegregated faculties. In this regard the properly trained personnel may be from within or without the system, provided they are properly trained for that purpose and are dedicated to a program of desegregated faculties.

II.

Director of Race Relations

The Board shall promptly designate and appoint a Director of Race Relations who shall devote his full time to investigating and recommending to the Board ways and means of assisting the Board in its affirmative duty to convert to a unitary system in which racial discrimination will be eliminated. Particular emphasis shall be given to those schools which are not desegregated.

1. It shall be the responsibility of the Director to formulate plans and programs for both interscholastic and extracurricular activities, the dominant purpose of which shall be to acquaint all students in this school system with the achievements, abilities, customs, and the problems and concerns of each other.

2. Initially, the Director shall formulate plans in the following areas:

A. *Principal Exchange and Visitation Program.* The present program of temporary reassignment of principals shall be expanded with emphasis on the temporary assignment of principals to schools where the predominant racial enrollment is different from that of the school to which the principal is regularly assigned.

B. *Teacher Exchange and Visitation Program.* There shall be temporary reassignment of teachers for limited periods of time to schools of different racial composition than that to which the teacher is regularly assigned.

C. *Pupil Exchange and Visitation Program.* The opportunities for gaining knowledge of and respect for opposite race can and should be afforded to pupils within this school system. As examples, exchange programs on a racial basis shall be started promptly in the following areas:

(1). *Vocational.* Interscholastic activities can be most diversified in this area. Exhibit days will be planned between schools and among several schools. Contests will be scheduled on the basis of quality workmanship in performing certain shop skills. Students and teachers will be exchanged for short periods of time. The various clubs in this area will have more interscholastic activities, using as a guide the existing programs in the field of Distributive Education.

(2). *Arts and Crafts.* Art exhibits, trips to art galleries, and jointly-sponsored speakers, art club affairs and, again, student exchanges.

(3). *Academic Courses.* Suitable methods of pupil exchange shall be devised so that students shall have the opportunity of attending classes or expanded lecture sessions with pupils of the opposite race.

(4). *Music and Debate.* Glee Clubs and Debate Teams are constantly in need of performing programs after having spent many hours of practice. Certainly a mutual respect for talent is imperative and added to this exchange would be complete tours of the school.

(5). *Elementary Schools.* The foregoing programs are primarily concerned with high school activities. The opportunities for elementary exchange are not more limited than the high school program. If it makes sense for pupils in School A to take a tour of a bakery or Brooks Gallery, then certainly it makes sense to have that particular group of children know something about the education of pupils in another school in this system. Joint tours of pupils from schools of predominantly different racial makeup will be planned.

III.

Unitary School Zones

The Department of Pupil Services in conjunction with the Director of Race Relations shall review annually and, where feasible, revise those school zone boundaries where a greater degree of desegregation may be achieved. Factors to be considered in addition to more effective desegregation shall be the capacity of the schools, the location of students, the location of existing school facilities

and the safety of the students, including natural boundaries, railroad crossings and thoroughfares.

Prior to January 1, 1970, the Board will file in this cause maps showing the revised zone boundary lines and will file enrollment figures by race of the pupils actually attending the schools as of the time of the report and enrollment figures by race of the pupils who live in the proposed revised zones.

IV.

Assignment and Transfer Policies

1. *Initial Assignment.* Each student shall receive initial assignment to the school serving the student's residence. Such assignments shall be made in the month of March each year.

2. *New Students.* First grade students and students new to the system shall be assigned to the school serving the zone of their residence. A transfer form and the policies governing transfers shall be furnished to the parents of those students and they shall have ten (10) days within which to exercise the right to transfer.

3. *Right to Transfer.* Student transfers to attend any school in the system outside the student's zone of residence shall be granted without restriction so long as the physical facilities of the school to which the transfer is sought are adequate. All transfers requested by students from a zone in which they are in a racial majority to a zone in which they will be in a racial minority will be allowed regardless of residence and subject only to lack of space to a degree whereby the transfer would interfere with the educational processes.

4. *Time to Request Transfer.* Twenty (20) days shall be allowed after the receipt of the initial assignment within which transfers may be sought.

5. *Priority of Transfers in Event of Closed Schools.* In the event more transfers are sought to a school than can be accepted with the available facilities, preference shall be granted to students on the basis of proximity of residence to the school to which the transfers are sought, subject, however, to the provisions of Item 3 above.

Those students whose application for transfer has been denied because of the lack of facilities at the school to which transfer is sought shall have an additional period of ten (10) days within which to seek transfer to another school where facilities are available.

No preference will be given to students previously attending a particular school or to previous transfer students.

6. *Notice to Patrons.* Each patron of the system shall be furnished with a copy of the transfer policies of the school system at the time of the student's assignment. Said policies shall also include a transfer request form. In the event a transfer is requested, said transfer form shall be completed and signed by the parent or guardian of the student and mailed or delivered to the school or the Administration Building of the Board of Education of the Memphis City Schools.

7. *Extra Copies of the Explanatory Letter and Transfer Form.* Extra copies of the explanatory letter and transfer form shall be freely available to parents, students, prospective students, and the general public at each school in the system and at the office of the Superintendent.

8. *Transfer Applications Not on Official Form.* The exercise of transfer rights may also be made by the submission in like manner of any other writing which contains information sufficient to identify the student and indicate that he has made a choice of school.

V.

Attendance Across School System Lines

No arrangement will be made by this school system for any students living in the community it serves to attend school in another school system where the opportunity is not available to all students similarly situated without regard to race or color. No arrangement will be made by this school system for any students living in another school system to attend school in this system where the opportunity is not available to all students similarly situated without regard to race or color.

VI.

School Facilities

The Board of Education shall close Getwell School on or before the opening of school in the year 1969-1970.

New schools, additions to existing schools and the use of portable classrooms shall be programmed, planned and constructed in furtherance of the Board's affirmative duty to convert to a unitary system free from racial discrimination and in accordance with other factors such as financial limitations, location of students, age level of the students, safety of the students and other relevant non-racial factors.

VII.

Non-Discrimination in Activities

The Board shall adopt the following policy: All students enrolled in any school shall be entitled to use or participate in all services, facilities, activities and programs that may be conducted or sponsored by or affiliated with the schools free from racial discrimination. A student attending school for the first time on a desegregated basis may not be subject to any disqualifications or waiting

period for participating in activities and programs, including athletics, which might otherwise apply because he is a transfer student, provided his participation would not result in the disqualification of any team because of the rules of any regulatory association.

WHEREFORE, defendants respectfully submit this as their Revised Plan of Desegregation as directed by this Honorable Court on May 15, 1969.

Evans, Petree, Cobb & Edwards
By /s/ Jack Petree
Attorneys for Defendant, Board of Education of the Memphis City Schools

Certificate of Service

Copy of the foregoing Revised Plan of Desegregation served on Ratner, Sugarmon, Lucas and Willis, Attorneys for Plaintiffs, by forwarding said copy by United States mail, postage prepaid, addressed to said attorneys at their business address in Memphis, Tennessee, this the 9th day of June, 1969.

/s/ Jack Petree